

Jurisdiction of Arbitral Tribunals

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The Concept of Jurisdiction

- Power of a court or tribunal to adjudicate a claim
- Difference to merits
- Key requirement in international dispute settlement is consent
- Several sub-elements:
 - Personal jurisdiction
 - Subject-matter jurisdiction
 - Temporal jurisdiction
 - Territorial jurisdiction

Consent to Arbitration

Colombia-UK BIT (2010), Article IX

ARTICLE IX

Settlement of Disputes between one Contracting Party and an Investor of the other Contracting Party

1. Any disputes arising between an investor of a Contracting Party and the other Contracting Party in connection to the interpretation or application of this Agreement, including a claim that the latter Contracting Party has breached an obligation under this Agreement, shall be settled, as far as possible, amicably. Any dispute shall be notified by submitting a written notification (“Notification of Dispute”).
2. With regard to acts of a governmental authority, in order to submit a claim to arbitration or to a local court or administrative tribunal in accordance with this Article, local administrative remedies shall be exhausted, should it be required by the law of the Contracting Party. Such procedure shall in no case exceed six (6) months from the date of the written notification by the investor.
3. Disputes between an investor of one Contracting Party and the other Contracting Party which have not been settled in accordance with paragraph (1) or paragraph (2), shall, after a period of six (6) months from the Notification of Dispute, be submitted to the local courts or to international arbitration if the investor concerned so wishes.

Requirement for Consent

Status of Eastern Carelia, PCIJ Ser. B, No. 5 (23 July 1923)

be deemed necessary by the Council. This rule, moreover, only accepts and applies a principle which is a fundamental principle of international law, namely, the principle of the independence of States. It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement. Such consent can be given once and for all in the form of an obligation freely undertaken, but it can, on the contrary, also be given in a special case apart from any existing obligation.

Where Can We Find Consent?

- Investor-State contract
- *Compromis* (ad hoc)
- National legislation
- Treaty

Consent – Textual Limits

UK-USSR BIT, Article 8

ARTICLE 8

Disputes between an Investor and the Host Contracting Party

(1) This Article shall apply to any legal disputes between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former either concerning the amount or payment of compensation under Articles 4 or 5 of this Agreement, or concerning any other matter consequential upon an act of expropriation in accordance with Article 5 of this Agreement, or concerning the consequences of the non-implementation, or of the incorrect implementation, of Article 6 of this Agreement.

(2) Any such disputes which have not been amicably settled shall, after a period of three months from written notification of a claim, be submitted to international arbitration if either party to the dispute so wishes.

Consent – Perfection

Koch Industries v. Canada, ICSID Case No. ARB/20/52, Request for Arbitration

III. CONSENT TO THE JURISDICTION OF THE CENTRE

A. The Claimants' Consent

22. The Claimants have consented to the submission of this dispute to the jurisdiction of ICSID by the filing of this Request for Arbitration.

B. The Respondent's Consent

23. The Respondent's consent arises through the text of the NAFTA, and the operation of the United States-Mexico-Canada Agreement (USMCA).

24. In NAFTA Article 1122(1), Canada consented to submit to arbitration claims for breaches of a substantive obligation of Chapter Eleven of that treaty. Further, NAFTA Article 1122(2) states that “[t]he consent given by paragraph 1 and the submission by a disputing investor of a claim to arbitration shall satisfy the requirement of ... Chapter II of the ICSID Convention (Jurisdiction of the Centre) ... for written consent of the parties.”

Consent – Multilateral Treaties

- North American Free Trade Agreement (NAFTA)
- United States-Mexico-Canada Agreement (USMCA)
- Dominican Republic-Central America Free Trade Agreement (CAFTA)
- Canada-EU Comprehensive Economic and Trade Agreement (CETA)
- Treaty on the Eurasian Economic Union (EEU Treaty)

Consent – Irrevocability

Colombia-UK BIT, Article IX(8)

8. Each Contracting Party hereby gives **in advance** its **irrevocable consent** to the submission of a dispute of this nature to any of the **arbitral proceedings** established in paragraph 4(a) to (d) of this Article.

Consent – Irrevocability

ICSID Convention, Article 25

Jurisdiction of the Centre

Article 25

(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. **When the parties have given their consent, no party may withdraw its consent unilaterally.**

Consent – Most-Favored-Nation Clauses

Germany-Bangladesh BIT, Article 2

Article 2

(1) Neither Contracting Party shall subject investments in its territory owned or controlled by nationals or companies of the other Contracting Party to treatment less favourable than it accords to investments of its own nationals or companies or to investments of nationals or companies of any third State.

(2) Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their activity in connection with investments, to treatment less favourable than it accords to its own nationals or companies or to nationals or companies of any third State.

Consent – Most-Favored-Nation Clauses

Colombia-UK BIT, Article III

ARTICLE III

National Treatment and Most Favoured Nation Provisions

1. Each Contracting Party shall grant to the investments of investors of the other Contracting Party made in its territory, a treatment not less favourable than that accorded, in like circumstances, to investments of its own investors or to investments of investors of another third State, whichever is more favourable to the investor.
2. The most favourable treatment to be granted in like circumstances referred to in this Agreement does not encompass mechanisms for the settlement of investment disputes, such as those contained in Articles IX and X of this Agreement, which are provided for in treaties or international investment agreements.

Pre-Arbitration Requirements and Choice of Forum

- Pre-Arbitration Requirements
 - Prior amicable settlement
 - Waiting period
 - Exhaustion of domestic remedies
- Choice of Forum
 - Domestic courts or arbitration
 - Different fora for investor-State arbitration

Prior Amicable Settlement

Colombia-UK BIT, Article IX(1)

ARTICLE IX

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Waiting Period

Colombia-UK BIT, Article IX(3) & (4)

3. Disputes between an investor of one Contracting Party and the other Contracting Party which have not been settled in accordance with paragraph (1) or paragraph (2), shall, after a period of six (6) months from the Notification of Dispute, be submitted to the local courts or to international arbitration if the investor concerned so wishes.

4. Where the dispute is referred to international arbitration, the investor shall give the Contracting Party written notification of its intent to do so at least six (6) months in advance (“Notification of Intent”). Such a notification shall indicate the name and address of the disputing investor, the provisions of the Agreement which it deems to be breached, the facts which the dispute is based on, the estimated value of the damages and compensation sought. The investor and the Contracting Party concerned in the dispute may agree to refer the dispute either to:

Exhaustion of Local Remedies

Colombia-UK BIT, Article IX(2)

2. With regard to acts of a governmental authority, in order to submit a claim to arbitration or to a local court or administrative tribunal in accordance with this Article, local administrative remedies shall be exhausted, should it be required by the law of the Contracting Party. Such procedure shall in no case exceed six (6) months from the date of the written notification by the investor.

Choice of Forum

Compania de Aguas del Aconquija S.A. & Vivendi Universal v. Argentina Republic, ICISID Case No. ARB/97/3, Decision on Annulment (3 July 2002)

95. As to the relation between breach of contract and breach of treaty in the present case, it must be stressed that Articles 3 and 5 of the BIT do not relate directly to breach of a municipal contract. Rather they set an independent standard. **A state may breach a treaty without breaching a contract, and vice versa, and this is certainly true of these provisions of the BIT.** The point is made clear in Article 3 of the ILC Articles, which is entitled “Characterization of an act of a State as internationally wrongful”:

Choice of Forum

Compania de Aguas del Aconquija S.A. & Vivendi Universal v. Argentina Republic, ICISID Case No. ARB/97/3, Decision on Annulment (3 July 2002)

101. On the other hand, where “the fundamental basis of the claim” is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state or one of its subdivisions cannot operate as a bar to the application of the treaty standard.⁷³ At most, it might be relevant—as municipal law will often be relevant—in assessing whether there has been a breach of the treaty.

103. Moreover the Committee does not understand how, if there had been a breach of the BIT in the present case (a question of international law), the existence of Article 16(4) of the Concession Contract could have prevented its characterisation as such. A state cannot rely on an exclusive jurisdiction clause in a contract to avoid the characterisation of its conduct as internationally unlawful under a treaty.

Umbrella Clauses

Ukraine-United States BIT, Article II(3)(c)

3. (a) Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.

(c) Each Party shall observe any obligation it may have entered into with regard to investments.

Umbrella Clauses

- Brings respect of other obligations within the protective “umbrella” of the investment treaty; addresses the problem of enforceability of contracts; overcomes the distinction between treaty and contract claims
- Effect on applicable law: content of underlying obligation determined by the law governing the obligation, not the treaty

Personal Jurisdiction – Investor

UK-Colombia BIT, Article I(1)

The term “investor” means:

- (a) In respect of the United Kingdom: Physical persons deriving their status as United Kingdom nationals from the law in force in the United Kingdom; and corporations, firms and associations incorporated or constituted under the law in force in any part of the United Kingdom or in any territory to which this Agreement is extended in accordance with the provisions of Article XIV, which have their registered office, central administration, or principal place of business, as well as substantial business activities, in the territory of the United Kingdom or in any territory to which this Agreement is extended in accordance with the provisions of Article XIV;
- (b) In respect of Colombia: Natural persons of Colombia who, according to the law of Colombia, are considered to be its nationals; and legal entities including companies, corporations, commercial associations and other organisations, constituted or otherwise organised according to the law of Colombia which have their seat, as well as substantial business activities, in the territory of Colombia.

Personal Jurisdiction – ICSID

ICSID Convention, Article 25

Jurisdiction of the Centre

Article 25

(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, **between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State,** which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

Personal Jurisdiction – Contracting States

ICSID Convention, Articles 67, 68, 71

Final Provisions

Article 67

This Convention shall be open for signature on behalf of States members of the Bank. It shall also be open for signature on behalf of any other State which is a party to the Statute of the International Court of Justice and which the Administrative Council, by a vote of two-thirds of its members, shall have invited to sign the Convention.

Article 68

(1) This Convention shall be subject to ratification, acceptance or approval by the signatory States in accordance with their respective constitutional procedures.

(2) This Convention shall enter into force 30 days after the date of deposit of the twentieth instrument of ratification, acceptance or approval. It shall enter into force for each State which subsequently deposits its instrument of ratification, acceptance or approval 30 days after the date of such deposit.

Personal Jurisdiction – Contracting States

ICSID Convention, Articles 67, 68, 71

Article 71

Any **Contracting State may denounce this Convention** by written notice to the depositary of this Convention. The denunciation shall take effect six months after receipt of such notice.

Personal Jurisdiction – Contracting States

ICSID Convention, Article 36

Section 1

Request for Arbitration

(3) The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register.

Personal Jurisdiction – Constituent Subdivision or Agency

ICSID Convention, Article 25(3)

(3) Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required.

Personal Jurisdiction – Nationality

ICSID Convention, Article 25

(2) “National of another Contracting State” means:

- (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and
- (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

Personal Jurisdiction – Nationality

Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18 (Decision on Jurisdiction) (29 April 2004), para. 52

52. In summary, the Claimant is an “investor” of Lithuania under Article 1(2)(b) of the BIT because it is an “entity established in the territory of the Republic of Lithuania in conformity with its laws and regulations.” This method of defining corporate nationality is consistent with modern BIT practice and satisfies the objective requirements of Article 25 of the Convention. We find no basis in the BIT or the Convention to set aside the Contracting Parties’ agreed definition of corporate nationality with respect to investors of either party in favor of a test based on the nationality of the controlling shareholders.

While some tribunals have taken a distinctive approach,⁴² we do not believe that arbitrators should read in to BITs limitations not found in the text nor evident from negotiating history sources.

Subject-Matter Jurisdiction – Investment

Bahrain-Netherlands BIT, Article 9

Article 9

(1) Disputes which might arise between one of the Contracting Parties and a national of the other Contracting Party **concerning an investment** of that national in the territory of the former Contracting Party shall, whenever possible, be **settled amicably** between the parties concerned.

(2) If the dispute has not been settled within a period of **three months** from the date either party to the dispute requested amicable settlement, that Contracting Party **irrevocably consents** that the dispute may be submitted at the request of the national concerned to:

Subject-Matter Jurisdiction, Investment

Bahrain-Netherlands BIT, Article 1(a)

(a) the term “investments” means every kind of asset and more particularly, though not exclusively:

- (i) movable and immovable property and any other property rights such as mortgages, liens and pledges, as well as any other similar rights in respect of every kind of asset;
- (ii) rights derived from shares, bonds and other kinds of interests in companies and joint ventures;
- (iii) claims to money, to other assets or to any performance having an economic value;
- (iv) rights in the field of intellectual property, technical processes, goodwill and know-how;
- (v) rights granted under public law or under contract, including rights to prospect, explore, extract and win natural resources.

Subject-Matter Jurisdiction – Investment

Malaysian Historical Salvors, SDN, BHD v. Malaysia, ICSID Case No. ARB/05/10 (Decision on the Application for Annulment) (16 April 2009), paras. 58-60

58. At issue in this case is the meaning of the treaty term “investment” as that term is used in Article 25(1) of the ICSID Convention—but also in Article 1 of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Malaysia for the Promotion and Protection of Investments because that instrument is the medium through which the Contracting States involved have given their consent to the exercise of jurisdiction of ICSID.

59. Article 1 of that Agreement defines “investment” capaciously.

For the purpose of this Agreement

(1)(a) ‘investment’ means every kind of asset and in particular, though not exclusively, includes:

Subject-Matter Jurisdiction – Investment

Malaysian Historical Salvors, SDN, BHD v. Malaysia, ICSID Case No. ARB/05/10 (Decision on the Application for Annulment) (16 April 2009), paras. 58-60

(ii) shares, stock and debentures of companies or interests in the property of such companies;

(iii) claims to money or to any performance under contract having a financial value;

(iv) intellectual property rights...;

(v) business concessions conferred . . . under contract....

60. The Contract between the Government of Malaysia and Malaysian Historical Salvors is one of a kind of asset; what is precisely at issue between the Government and the Salvor is a claim to money and to performance under a contract having financial value; the contract involves intellectual property rights; and the right granted to salvage may be treated as a business concession conferred under contract.

Subject-Matter Jurisdiction – Investment

CMS Gas Transmission Co. v. Argentina, ICSID Case No. ARB/01/8 (Decision of the Tribunal on Objections to Jurisdiction) (17 July 2003), paras. 48, 51

48. The Tribunal therefore finds **no bar in current international law to the concept of allowing claims by shareholders independently from those of the corporation concerned**, not even if those shareholders are minority or non-controlling shareholders. Although it is true, as argued by the Republic of Argentina, that this is mostly the result of *lex specialis* and specific treaty arrangements that have so allowed, the fact is that *lex specialis* in this respect is so prevalent that it can now be considered the general rule, certainly in respect of foreign investments and increasingly in respect of other matters.²⁹ To the extent that customary international law or generally the traditional law of international claims might have followed a different approach — a proposition that is open to debate — then that approach can be considered the exception.

51. Precisely because the Convention does not define "investment", it does not purport to define the requirements that an investment should meet to qualify for ICSID jurisdiction. **There is indeed no requirement that an investment, in order to qualify, must necessarily be made by shareholders controlling a company or owning the majority of its shares.** It is well known incidentally that, depending on how shares are distributed, controlling shareholders can in fact own less than the majority of shares. The reference that Article 25(2)(b) makes to foreign control in terms of

Subject-Matter Jurisdiction, Investment ICSID Convention, Article 25

Jurisdiction of the Centre

Article 25

(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

Subject-Matter Jurisdiction – “Investment” under ICSID Convention

Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction (23 July 2001)

The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction (cf. commentary by E. Gaillard, cited above, p. 292). In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.

In reality, these various elements may be interdependent. Thus, the risks of the transaction may depend on the contributions and the duration of performance of the contract. As a result, these various criteria should be assessed globally even if, for the sake of reasoning, the Tribunal considers them individually here.

Legality of Investments – In-Accordance-with-Host-State-Law Clauses

Germany-Philippines BIT, Article 1

UK-USSR BIT, Article 1(1)

Art. 1 Germany-Philippines BIT

For the purpose of this Agreement:

(1) the term "investment" shall mean any kind of asset accepted in accordance with the respective laws and regulations of either Contracting State, and more particularly, though not exclusively: ...

Art. 1(1) UK-USSR BIT

Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party to make investments in its territory, and, subject to its right to exercise powers conferred by its laws, shall admit such investments.

Temporal Jurisdiction

UK-Colombia BIT, Article III(1)

1. This Agreement is applicable to **existing investments** at the time of its **entry into force**, as well as to investments made thereafter in the territory of a Contracting Party in accordance with the law of the latter by investors of the other Contracting Party.

Temporal Jurisdiction

UK-Colombia BIT, Article XIII(1) and (2)

Scope of Application

1. This Agreement is applicable to **existing investments** at the time of its **entry into force**, as well as to **investments made thereafter** in the territory of a Contracting Party in accordance with the law of the latter by investors of the other Contracting Party.
2. For greater certainty, the provisions of this Agreement shall **not apply** to **claims arising out of events which occurred, or to claims which had arisen, prior to its entry into force.**

Territorial Jurisdiction – Definition of Investment

UK-Colombia BIT, Article I(2)

Investment

- (a) Investment means every kind of economic asset, owned or controlled directly or indirectly, by investors of a Contracting Party **in the territory of the other Contracting Party**, in accordance with the law of the latter, including in particular, but not exclusively, the following:

Territorial Jurisdiction – Definition of Territory

UK-Colombia BIT, Article I(4)

The term “territory” means:

- (a) In respect of the **United Kingdom**: Great Britain and Northern Ireland, including the territorial sea and maritime area situated beyond the territorial sea of the United Kingdom which has been or might in the future be designated under the national law of the United Kingdom in accordance with international law as an area within which the United Kingdom may exercise rights with regard to the sea-bed and subsoil and the natural resources and any territory to which this Agreement is extended in accordance with the provisions of Article XIV; and
- (b) In respect of the **Republic of Colombia**: In addition to its continental territory, the archipelago of San Andres, Providencia and Santa Catalina, the Island of Malpelo, and all the other islands, islets, keys, headlands and shoals that belong to it, as well as airspace and maritime areas over which it has sovereignty or sovereign rights or jurisdiction in accordance with its domestic law and international law, including applicable international treaties.

Jurisdictional Objections

UNCITRAL Arbitration Rules 2021, Article 23

Pleas as to the jurisdiction of the arbitral tribunal

Article 23

1. The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null shall not entail automatically the invalidity of the arbitration clause.

Jurisdictional Objections

ICSID Convention, Article 41

Powers and Functions of the Tribunal

Article 41

(1) The Tribunal shall be the judge of its own competence.

(2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.